1950.

File No. S.DWR 11/50

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Examined

Legal **DEPARTMENT**

A **BRANCH**

Subject:— Dharwar Suit

Civil suit No. 60 of 1948.

Rámabai Mangeshrao Tergaonkar - Plff

vs.

The collector, Dist. Kanara and others - } - Defts.

For setting aside the order of the Collector dated the 25th May 1949, confirming the Mamlatdar's order dated the 17th June 1944 directing the Plff to reduce the level of the mouth of the water course in Survey No. 93 and for a permanent injunction

S.DWR 11/50

File No.

S.DWR 11/50

C O N T E N T S.

Legal Department File No. S.Dwr. 11/50

Sr.No.	R.I./O.No.	Subject	Pages.

Suits Dharwar

C. S. No. 60 of 1948

R. M. Tergaonkar - plff -

V/s.

The Collector, District Kanwar and others

Defts.

For setting aside the order of the Collector dated the 25th May 1947, confirming the Mamlatdar's order dated the 17th June 1946 directing the plff. to reduce the level of the mouth of the water course in Survey Nos. No. 93. and for a permanent injunction.

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L.C.Suit No.60 of 1948. 25

In the Court of the Civil Judge, Junior Dn.,
At Dharwar.

Plaintiff :- Ramabai Mangeshrao Tergaonkar of Haliyal.

Against.

Defendants:- 1. Shambappa Virbhadrappa Hiremath of Haliyal.
2. Narayan Subraj Sonar of Do.
3. Shripad Dattratrya Deshpande of Do
4. Vishwanath Dattratraya Deshpande of Do.
5. Vinayak Dattratraya Deshpande of Do
6. Havalappa Basappa Batigi of Do.
7. Kalappa Bharamappa Kambar og Do.
8. The Collector, District Karwar for whom summons may be served on Government Pleader, R.V.Jathar, Pleader, Dharwar.

Claim Rs.

The plaintiff states as follows :-

1. Description of the property R.S.No.93 - Acres 5-11 - Assessment Rs.16/- of Madnalli a village in Taluka Haliyal. Plaintiff is the owner of this land and her husband Mangeshrao Tergaonkar is making wahiwat on her behalf. He knows facts of the case & he is giving instructions on her behalf.

2. In the village of Madnalli there is a tank in Survey No.14 the water of which is supplied to the lower fields from two outlets as shown at A and B in the sketch map produced with this plaint. From out-

outlet A the lands of about 105-5 are irrigated. As there is no complaint in respect of outlet A in this suit no perticular mention is made to it.

3. According to the Irrigation Department 69 acres and 27 gunthas of land are supplied with the tank water from the outlet B which is to the west of the tank, The water which starts from B outlet passes through Survey No.12 and goes to Survey Nos.8, 12, 6, 5, 2, and 1 respectively as shown by a red line in the map and passes through Survey No.18 and 15 and goes to Survey No.93 to its deep portion which is owned by the plaintiff, since a very long time. This plaintiff has a vahiwati (easement) right of receiving water from the said tank. The said water comes to Survey No.93 and 94 through the boundary stones to the east of 2 and 3 i.e. through S.No.93 and 15 by the west boundary stones 6 and 7 as shown at C by a red line in the map. Thus the Survey No.93 receives tank water by wahiwati right.

4. Some portion of Survey No.93 to the east is deep and its portion to the west is high levelled. The water comes to C the deep portion of the said land as shown in the map. The western portion is 2-2½ feet higher than the eastern portion.

5. Defendant 1 is the owne r of Survey Nos.92, 88 and 89 of Madnalli village: Defendant 2 is the Kabjedar of Survey No.91. Defendants 3,4 and 5 are the owners of Survey No.90 and defendants 6-7 are owners of Survey No.15. The defendants 1-5 have a right to receive tank water and therefore they are made parties to the suit so that there may not be any complaints from them.

6. As mentioned above the survey No.93 belonging to the plaintiff has a vahivat of receiving the water from outlet B of the plaint tank as it has been receiving the water continuously for the last several years. Inspite of this defendant 1 with the help of defendants 6-7 with an object

of causing loss to the plaintiff and with a view to obstruct the vahivati right of plaintiff's taking water from the tank raised the land to about 2 feet in Survey No.15 to the east in about 1945 by putting heep of mud there, in about 1945 at D E F shown in the map and stopped the water at C coming to Survey No.93 and diverted the same to their own field for making dishonest profit to themselves and broke the vahivati which was in existence for many years.

7. The plaintiff is therefore forced to bring this suit for permanent injunction to remove the obstruction of the defendants to plaintiff's vahivati right as stated above.

8. Besides this defendant 1 submitted a false application to the Mamlatdar of Haliyal to cause inconvenience and loss to the plaintiff falsely alleging that the plaintiff by raising the level of his land S.No.93 obstructed water flowing to the Survey No.93 and that the plaintiff should remove the raised portion and make it levelled . The Mamlatdar passed an order on 17-6-1946 that the plaintiff should remove the raised portion from his land. The plaintiff preferred an appeal to the Collector who dismissed the appeal on 25-5-1947. As much loss is likely to be caused by removing the high levelled portion of the plaintiff's land it has become necessary to get these orders also set aside. The vahivat of receiving water to the plaint land is not from G but from C and as such this suit is filed to set aside the orders of the Mamlatdar and Collector which are neither proper nor legal.

9. The cause of action arose on 15-5-1947 when the Collector passed his order.

10. This Court has jurisdiction to try this suit

as the plaintiff and defendants are xxxxxx residing and the property is situated within the jurisdiction of this Court.

11. The valuation for the purpose of Court fees is 19-4-0 as the suit is for setting aside the Collector's order and for xxxxxxxxxxxxxxxxxx injunction against defendants for and for jurisdiction Rs.20/- .

12. Plaintiff prays :-

A. To set aside the order of the Revenue Court which directed the plaintiff to remove the high levelled portion of S.No.93 as shown at letter G in the map.

B. To issue permanent injunction to defendants not to obstruct water coming to Survey No.93 from the tank Survey No.14 through Surveu No. 15at letter G in the map.

C. To award costs of this suit.

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Legal Department.

Dharwar Civil Suit No.60/1948.

The suit is for setting aside an order passed by the Collector on appeal against an order passed by the Mamlatdar under section 26 of the Irrigation Act, 1879.

2. On an application from the defendant No.1 the Mamlatdar directed the plaintiff to reduce the level of Survey No.93 so as to permit the flow of water from his land to the lands of the other defendants through the tank of survey No.14 which is a second class irrigation work. As a matter of fact, the orders passed by both the Mamlatdar and the Collector were invalid and they were, therefore, set aside by the Commissioner on appeal preferred by the plaintiff. The Commissioner directed a fresh inquiry in the case under sec.26. The suit was filed while the appeal before the Commissioner was pending. The fresh order passed by the Mamlatdar under the orders of the Commissioner is actually in favour of the plaintiff. For that reason and also in view of the fact that the order which he wants to set aside has already been quashed by the Commissioner, there is no cause of action for this suit. Apart from that, the suit suffers from the defect of absence of notice under section 80 of the Civil Procedure Code.

3. The defence of the suit may be sanctioned on the lines of the accompanying brief.

No.9443

7 75

IN THE COURT OF THE CIVIL JUDGE,
JUNIOR DVN. DHARWAR.

C. S.No. 60 of 1948.

Ramabai Mangeshrao Tergaonkar of Haliyal. — Plaintiff.

vs.

1.Shambappa Virbhadrappa Hiremath of Haliyal and 6 others.

8. The Collector, Dist.Karwar. — Defendants.

Following is the written statement of the defendant No.8 in this suit.

2. The plaintiff has filed this suit without giving notice under section 80 of the Civil Procedure Code. The Court is, therefore, debarred from entertaining the present suit, which must be summarily dismissed.

3. The Collector of Karwar is not liable to be sued in his official capacity and the suit against him is not maintenable.

4. Without prejudice to the above it is submitted that the plaint discloses no cause of action against this defendant. The order of the Collector dated the 25th May 1947 confirming the Mamlatdar's order of the 17th June 1946 against which the plaintiff seeks relief has already been quashed by the Commissioner under his order No.IRR. dated the 3rd April 1948. The Commissioner while quashing the Collector's order directed a fresh inquiry into the case under section 26 of the Irrigation Act of 1879; and the Mamlatdar after having held such fresh inquiry held in his order dated the 25th August 1948 that he does not find any grounds as the Canal Officer to order Mr. Tergaonkar (the plaintiff's husband) to lower the ground of survey No.93. He further directed the maintenance of status quo pending the decision of the suit.

5. . . . .

6. The defendant, therefore, submits that the fresh order passed by the Mamlatdar being in favour of the plaintiff he has no cause of action so far as this defendant is concerned, and, therefore, the suit against this defendant must be dismissed with costs.

District Government Pleader,

.....

I, District Government Pleader, ... do hereby declare that what is stated in paragraphs 2 to 5 above is true according to the information received and believed to be true. This verification is made at . . . . . on the day of 1950.

District Government Pleader,

. . . . . .

Suits :

Dharwar.

For setting aside the order of the Collector dated the 25th May 1947, confirming the Mamlatdar's order dated the 17th June 1946 directing the plaintiff to reduce the level of the mouth of the water course in Survey No. 93 and for a permanent injunction.

GOVERNMENT OF BOMBAY.

LEGAL DEPARTMENT.

Resolution No. 10118.

Bombay Castle, 18th July 1950.

Letter from the Collector of Kanara, No. TRA. 2070, dated the 10th March 1950—Forwarding the papers in the suit noted in the margin and requesting sanction to its defence.

IN THE COURT OF THE CIVIL JUDGE (JUNIOR DIVISION), DHARWAR.

Civil Suit No. 60 of 1948.

Ramabai Mangeshrao Tergaonkar ... ... Plaintiff ;

versus

The Collector, District Karwar and others ... Defendants.

Endorsement from the Commissioner, Southern Division, No. L.S.T. 430, dated the 22nd March 1950 forwarding the above with his concurrence.

Memorandum to the District Government Pleader, Dharwar, No. 9775, dated the 12th July 1950—Forwarding a copy of the brief with its accompaniments in advance.

RESOLUTION.—Sanction is accorded to the defence of the suit on the lines of the accompanying brief.

By order of the Governor of Bombay,

R Ratnakar

Original, for P. M. LAD,
Secretary to Government.

G. R., L. D., No. 10118, dated the 18th July 1950.

To

* The Public Works Department,
* ~~The Commissioner, Southern Division,~~
* The Collector of Karwar,
The District Government Pleader, Dharwar (with two copies of the brief).

* With a copy of the brief.

No. of 1950.

Issued on 21/9/50

Copy forwarded for information and guidance to

Submitted after disposal of file in S. Dwr/50 (new)

22-9-50

A.A.S. E-3

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DHARWAR CIVIL SUIT No. 60 OF 1948.

Chronological Statement of Facts.

In this suit the plaintiff prays for setting aside the order of the Collector, dated the 25th May 1947, confirming the Mamlatdar's order dated the 17th June 1946 directing the plaintiff to reduce the level of the mouth of the water course in Survey No. 93 and for a permanent injunction restraining Defendants Nos. 1 to 7 from obstructing the flow of water coming to Survey No. 93 from the tank in Survey No. 14 of the village Madnalli.

2. The plaintiff is the owner of Survey No. 93 of the village of Madnalli which is irrigated by means of a water course from a tank in Survey No. 14 which is a second-class irrigation work. Besides the plaintiff's land, Survey Nos. 88 to 92 are also irrigated by the same tank.

3. The defendant No. 1 made an application to the Mamlatdar of Haliyal Taluka complaining that the plaintiff had made an obstruction to the water course by raising the level of the water-course in Survey No. 93 and thereby obstructed the flow of water in the other lands. After making inquiries and after a personal inspection of the site the Mamlatdar passed an order on the 17th June 1946 directing the plaintiff to reduce the level of the mouth of the water-course in Survey No. 93.

File p. 63/64.

4. The plaintiff preferred an appeal against this order but it was dismissed by the Collector by his order dated the 25th May 1947. The plaintiff thereupon made a further petition of appeal to the Commissioner, but while it was pending, she filed the present suit in the Court of the Civil Judge, Junior Division, Dharwar.

File p. 91.

Grounds of Defence.

Notice.—The plaintiff appears to have filed this suit without giving any notice under section 80 of the Civil Procedure Code. Section 80 is express, explicit and mandatory and admits of no exceptions and absolutely debars a Court from entertaining any suit filed without its compliance. (Bhagchand *v.* Secretary of State. I.L.R. 57, Bom. 725). The District Government Pleader is requested to ascertain from the Collector whether any such notice was given or not. At any rate, there is no averment in the plaint itself of the delivery of notice as required by section 80 and for that reason also the plaint deserves to be summarily rejected.

2. Without prejudice to the contention as regards the notice it should be contended that there is no cause of action against the Collector who has been impleaded as defendant No. 8. As stated above, the suit was filed while the plaintiff's appeal was pending with the

Commissioner. The Mamlatdar's order dated the 17th June 1946 was purported to have been passed under section 26 of the Bombay Irrigation Act, 1879 (VII of 1879). Under that section the Canal Officer (the Mamlatdar in this case) is required to give a notice to the persons interested that he will proceed with the inquiry on a particular date to be specified in the notice and it is only if all the persons interested consent in writing to his being an arbitrator that the Mamlatdar can proceed with the inquiry and pass an order under that section. Failing to obtain such consent the Mamlatdar has to transfer the matter to the Collector whose order would remain in force until set aside by a decree of a Civil Court. In the present case the Mamlatdar had issued a notice to the parties concerned but he did not get the written consent to his being an arbitrator. The order of the Mamlatdar was clearly *ultra vires*. Further, the order passed under section 26 is not appealable (*vide* section 67) and, therefore even the Collector had no jurisdiction to entertain the appeal preferred by the plaintiff. The Commissioner, who noticed these illegalities, therefore, rightly set aside the order passed by the Collector and directed a fresh inquiry under section 26 of the Act. In pursuance of the Commissioner's order the Mamlatdar of Haliyal visited the site on the 24th June 1948 in the presence of the parties, including the plaintiff's husband, and after making the necessary inquiries he passed an order on the 25th August 1948 in which he held that there were no grounds to order the plaintiff to reduce the level of Survey No. 93. He further directed that since the plaintiff had filed the civil suit *status quo* should be maintained until the suit was decided.

3. It will, therefore, be seen that the order against which the plaintiff complains in this suit has already been set aside by the Commissioner and the fresh order passed by the Mamlatdar is, in fact, in favour of the plaintiff. Therefore, so far as the defendant No. 8 (the Collector) is concerned the plaint discloses no cause of action and the suit, should be dismissed.

4. For the above reasons it may be submitted that the suit against the Collector fails and may be dismissed with costs.

Long Cause Civil Suit No.67 of 1948.

In the Court of the Civil Judge, Senior Division, Dharwar, at Dharwar.

Plaintiff :- Ramabai Bhimrao Mangeshrao Tergaonkar, of Haliyal.

Versus.

Defendants:- 1. Chambhayya Virabhadrayya Hiremath, of Medinelli, Taluka Haliyal, and 6 others.

8. The Province of Bombay (amended as per order below Exh.68).

Claim Rs.305/-

O r d e r

Suit dismissed with costs for want of prosecution. (Exh.94). Plaintiff to pay costs of defendants (one set

14-6-1951. Sd/- S.S.Alur,
Civil Judge.

Bill of Costs

Stamps for plaint	19- 4-0	Stamps for vakalat.	1-14-0-
do for vakalat.	1- 4-0	-do- for applications.	8- 6-0
do for applications.	6- 3-0	Pleaders fees (double set)	30- 0-0
Witness potgi.	41-10-0	Process fees.	11-10-0
Pleaders fees (minimum)	15- 0-0	Takid.	190- 0-0
Process feess.	26- 8-0		
Copying fees.	1- 6-3	Total.	241-14-0
Takid.	50- 4-0		
Total.	161- 7-3	Rejected Costs.	4- 4-0
Rejected costs	3- 5-0	Balance.	237-10-0
Balance.	158- 2-3		

Given under my hand and seal of the Court this 14th day of June, 1951.

Sd/- S.S.Alur,
C.J.S.D., Dharwar.

27-6-1951

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Suits:
Dharwar.
For setting aside the order of the Collector dated the 25th May 1947, confirming the Mamlatdar's order dated the 17th June 1946 directing the plaintiff to reduce the level of the mouth of the water course in Survey No.93 and for a permanent injunction.

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No. 16678.
Bombay Castle, 20th October 1951.

Read Government Resolution, Legal Department No.10118 dated the 18th Junly 1950.

Letter from the District Government Pleader, Dharwar No. 522 dated the 22nd June 1951, stating that the suit noted in the margin was decided by the Civil Judge, Senior Division, Dharwar, on 14th June 1951, when the following order was passed:

In the Court of the Civil Judge (Junior Division), Dharwar. Civil Suit No.60 of 1948. Ramabai Mangeshrao Tergaonkar..Plaintiff. vs. The Collector, District Karwar & others..... Defendants.

" Suit dismissed with costs for want of prosecution (Ex.94) Plaintiff to pay costs of defendants (one set)"

Letter from the District Government Pleader, Dharwar No.874 dated the 25th September 1951, forwarding uncertified copies of the judgment and decree.

RESOLUTION: The result of the suit is recorded.

By order of the Governor of Bombay,

original R T Katarki

R.T.Katarki,
Deputy Secretary to Government.

To
The Public Works Department,
The Collector of Karwar,
The District Govt. Pleader, Dharwar

KML 25/10.

Submitted for sign
29/10
D. S.

KT/10

Subject applicable
file in Adm 11/50

DE
28/10

CAS E.S
28/10